

HONORABLE ROBERT S. LASNIK

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MMMT Holdings Corporation,
a Minnesota corporation,

Plaintiff,

v.

NSGI Holdings, Inc.,
a Delaware corporation,

Defendant.

No. 2:12-cv-01570 RSL

**PLAINTIFF'S REPLY TO DEFENDANT'S
OPPOSITION TO PLAINTIFF'S MOTION
TO MODIFY THE SCHEDULING ORDER
[DKT. NO. 116]**

NOTE ON MOTION CALENDAR:
MAY 9, 2014

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiff has worked diligently to conduct discovery and to uncover the facts that form the basis for the new claims asserted in the proposed Third Amended Complaint. Plaintiff has navigated a logistically difficult discovery process, which involved NSGI's failure to produce any meaningful amount of discovery until October 22, 2013, and only then after being ordered by the Court to do so. Plaintiff then confronted significant time and language barriers related to the review and analysis of the Japanese documents that NSGI finally produced. Contrary to NSGI's claim, Plaintiff could not seek leave to amend its Complaint prior to learning of its basis to do so. Once that basis became clear, Plaintiff took all reasonable steps to promptly file this Motion and its Motion to Amend. Neither NSGI, nor the proposed additional defendants, would

**PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION TO MODIFY THE SCHEDULING ORDER
[DKT. NO. 116] (No. 2:12-cv-01570 RSL) – 1**

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 be prejudiced by the amendment. Good cause therefore exists to modify the scheduling order,
 2 and the Court should grant Plaintiff's request to do so.¹
 3

4 II. ARGUMENT

5 A. Plaintiff has Diligently Pursued Discovery and Timely Sought Leave to File its 6 Third Amended Complaint

7 NSGI claims Plaintiff "already" knew about EYTAS and other key facts underpinning
 8 Plaintiff's motions; NSGI is simply wrong. Plaintiff did not, and could not, know that Nisshin
 9 secretly obtained a prior appraisal from the same appraiser it sought to appoint to conduct the
 10 valuation contemplated by the PIMIPA, and Plaintiff did not, and could not, know that Nisshin
 11 had struck a deal with that appraiser to allow Nisshin to influence that supposedly independent
 12 appraisal prior to it being finalized. Plaintiff could not know those facts because NSGI
 13 intentionally concealed them from Plaintiff, saying it was "none of their business." (Sugata Dep.
 14 attached as Ex. U to the Declaration of William Z. Pentelovitch (Dkt. #113-21, pg. 3 of 5).) The
 15 facts underpinning the proposed plaintiffs' new claims are premised on those newly uncovered
 16 facts, which were revealed in the newly translated documents and recent deposition testimony.
 17 While Plaintiff may have known of EYTAS's *existence*, such knowledge was irrelevant to *fraud*
 18 claims until it learned of the fraud involving nondisclosure of the desktop appraisals done by
 19 EYTAS and Ernst & Young LLP (EYUS). It was not until completion of NSGI's document
 20 production, translation of those documents, and testimony obtained in depositions in March and
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41

42 ¹ Plaintiff's Motion to Modify the Scheduling Order presents something of a procedural "chicken and egg"
 43 problem. First, Plaintiff needs to have the Scheduling Order modified to allow it to present its Motion for Leave to
 44 File Third Amended Complaint and to allow Plaintiff to use the testimony obtained via the Letter Rogatory
 45 process. If the Court grants Plaintiff's Motion to File Third Amended Complaint, the remainder of the Scheduling
 46 Order modification is necessary to allow the new defendants to answer and accommodate any motion practice and
 47 discovery to follow. On the other hand, if the Court modifies the Scheduling Order to permit Plaintiff to bring its
 48 motion to amend the pleadings, but then denies Plaintiff's Motion for Leave to File Third Amended Complaint, the
 49 remainder of the changes proposed in the Motion to Modify Scheduling Order (other than those permitting
 50 testimony obtained to the Letters Rogatory) would become moot. Thus, from a purely procedural point of view,
 51 Plaintiff is not entitled to have its motion to amend the pleadings heard until the Scheduling Order is first modified,
 but won't need all of the modifications requested if the motion to amend the pleadings is denied.

1 April 2014, that Plaintiff had sufficient evidence of fraud to be able to seek to amend its
 2 Complaint consistent with Rule 11.
 3

4 NSGI points to Plaintiff's attempts to obtain discovery from EYTAS as an example of
 5 Plaintiff's lack of diligence. (See Dkt. #122 (Br. in Opp'n) at pps. 7-8 of 14.) Here again, NSGI
 6 fails to acknowledge the logistical difficulties presented in this case, and Plaintiff's diligent
 7 navigation of those barriers. Given the cumbersome and restricted nature of the Letter Rogatory
 8 process—burdensome both for the parties and the Court—it would be undesirable to jump into
 9 that process without first exhausting more efficient ways of obtaining the requested information,
 10 i.e., by obtaining the voluntary cooperation of a party with whom NSGI has a significant
 11 relationship. Indeed, NSGI has attempted to claim privilege as to documents exchanged with
 12 EYTAS (and EYUS). Yet here, NSGI turns around and suggests it was somehow inappropriate
 13 for Plaintiff to request NSGI's assistance (and the assistance of EYUS) in attempting to obtain
 14 EYTAS's cooperation in discovery without resorting to a cumbersome international judicial
 15 process. (*Id.*) Plaintiff should not be penalized because NSGI was unable (or unwilling) to
 16 obtain EYTAS's cooperation to appear voluntarily.
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29

30 With respect to the Letter Rogatory process itself, the "delays" NSGI points to were
 31 neither extraordinary nor unexplainable. Indeed, as the Court is aware, all of the documents
 32 included with the Letter Rogatory, including the twenty pages of questions for the EYTAS
 33 witnesses and the ten exhibits attached to the questions (many of which were quite technical and
 34 voluminous), all needed to be officially translated to Japanese prior to Plaintiff submitting the
 35 Letter Rogatory to the Court. That process alone was extremely time consuming and costly, and
 36 was taking place while Plaintiff was in the process of negotiating various issues related to the
 37 Letter Rogatory with NSGI's counsel.² As soon as all of the documents were translated, Plaintiff
 38 filed the request for the Letter Rogatory with the Court. (Dkt. #108.) As this Court well knows,
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48

49 ² For the Letter Rogatory alone, Plaintiff had 45,117 words translated (or approximately ten documents) for
 50 a cost of \$12,358.76, which includes additional costs for rush fees so Plaintiff could timely file the submission with
 51 the Court. (See invoices attached as Ex. A to the Declaration of Anna Petosky filed herewith.)

1 Plaintiff has no control over when the Japanese Court will choose to ask the questions requested
 2 pursuant to the Letter Rogatory.³
 3

4
 5 **B. Modification of the Case Schedule Would Not Prejudice NSGI or Nisshin.**

6 Rather than frankly acknowledge the logistical difficulties in this case and its role in
 7 delaying the document production, NSGI instead argues that the Court should prefer expediency
 8 over the resolution of Plaintiff's claims on the merits. NSGI's suggestion that the supposed
 9 "prejudice" to NSGI plays any significant role in resolving this motion is clearly contradicted by
 10 the Federal Rule and the case law of this circuit. Fed. R. Civ. P. 16(b)(4); *Johnson v. Mammoth*
 11 *Recreations*, 975 F.2d 604, 609 (9th Cir. 1992). To the extent that NSGI and Nisshin might need
 12 to undertake additional discovery efforts, that is the result of their own doing, because if it
 13 weren't for NSGI's fraud, the new claims and parties would have come to light sooner. In any
 14 event, any claims of prejudice should be considered in the context of Rule 15(a), not here. *See*
 15 *Johnson*, 975 F.2d at 608. Indeed, notably absent from NSGI's obfuscating response is any
 16 discussion of the fact that NSGI has delayed discovery through its own fraud and litigation
 17 delays, and NSGI's bald attempts to claim prejudice should be rejected out of hand.
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29

30
 31 **III. CONCLUSION**

32 Plaintiff has shown good cause to modify the scheduling order because, despite
 33 Plaintiff's diligent efforts, the pretrial schedule cannot now be met. Accordingly, this Court
 34 should allow modification of the scheduling order to allow Plaintiff to file its Third Amended
 35 Complaint and should adjust the trial date and corresponding deadlines accordingly.
 36
 37 Alternatively, if this Court does not grant leave to file the Third Amended Complaint, this
 38 request becomes moot as to everything but allowing sufficient time for the Letter Rogatory
 39 process to run its course.
 40
 41
 42
 43
 44
 45
 46

47
 48 ³ Plaintiff recently inquired of the U.S. State Department to determine where in the process the Letter
 49 Rogatory had progressed. It was told that the Letter Rogatory has been forwarded to the appropriate Japanese
 50 authorities in the United States. The Letter Rogatory now must be forwarded by those Japanese authorities to the
 51 Japanese foreign ministry, and from there to the court in Tokyo. As before, Plaintiff does not know how long that
 process will take to play out, and Plaintiff has no control over it.

1
2 DATED: May 8, 2014
3

4 By: s/William B. Stafford
5 By: s/Kevin J. Hamilton
6 Kevin J. Hamilton (#15648)
7 William B. Stafford (#39849)
8 Perkins Coie LLP
9 1201 Third Avenue, Suite 4900
10 Seattle, WA 98101-3099
11 Telephone: 206-359-8000
12 Facsimile: 206-359-9000
13 E-mail: khamilton@perkinscoie.com
14 wstafford@perkinscoie.com

15 **Attorneys for Plaintiff**
16 **MMMT Holdings Corporation**
17

18
19 By: s/William Z. Pentelovitch
20 By: s/Nicole Narotzky
21 William Z. Pentelovitch (MN #85078)
22 Nicole Narotzky (MN #0329885)
23 Anna Petosky (MN #0388163)
24 Maslon Edelman Borman & Brand, LLP
25 3300 Wells Fargo Center
26 90 South Seventh Street
27 Minneapolis, MN 55402-4140
28 Telephone: 612-672-8200
29 Facsimile: 612-672-8397
30 Email: bill.pentelovitch@maslon.com
31 nicole.narotzky@maslon.com
32 anna.petosky@maslon.com
33

34 **Attorneys for Plaintiff**
35 **MMMT Holdings Corporation**
36

37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
#1037569

HONORABLE ROBERT S. LASNIK

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MMMT Holdings Corporation,
a Minnesota corporation,

Plaintiff,

v.

NSGI Holdings, Inc.,
a Delaware corporation,

Defendant.

No. 2:12-cv-01570 RSL

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2014 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Benjamin J. Byer	benbyer@dwt.com
Jonathan M. Lloyd	jonathanlloyd@dwt.com
Robert J. Maguire	robmaguire@dwt.com
Douglas C. Ross	douglasross@dwt.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

N/A	
-----	--

CERTIFICATE OF SERVICE
(No. 2:12-cv-01570 RSL) – 1

87326-0001/LEGAL120872391.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1
2 DATED: May 8, 2014
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

Kevin J. Hamilton (#15648)
William B. Stafford (#39849)
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206-359-8000
Facsimile: 206-359-9000
Email: khamilton@perkinscoie.com
wstafford@perkinscoie.com

**Attorneys for Plaintiff
MMMT Holdings Corporation**

By: s/William Z. Pentelovitch
William Z. Pentelovitch (MN #85078)
Nicole Narotzky (MN #0329885)
Anna Petosky (MN #0388163)
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
Telephone: 612-672-8200
Facsimile: 612-672-8397
Email: bill.pentelovitch@maslon.com
nicole.narotzky@maslon.com
anna.petosky@maslon.com

**Attorneys for Plaintiff
MMMT Holdings Corporation**

#1037569

CERTIFICATE OF SERVICE
(No. 2:12-cv-01570 RSL) – 2

87326-0001/LEGAL120872391.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000